TAN SOON KOON v. DATO' SERI LIOW TIONG LAI & ANOR

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY J
[SUIT NO: 22NCVC-681-11-2017]
15 JANUARY 2019

CONTRACT: *Specific performance – Agreement – Whether there was concluded agreement – Whether parties had intention to create binding agreement – Whether party seeking specific performance prepared to perform its side of agreement – Delay in commencement of action – Whether delay explained – Whether grant of specific performance appropriate and justified – Whether damages for breach of contract fair compensation*

MCA Selangor, a branch of MCA and a registered society under the Societies Act 1966, was the registered proprietor of the land, the subject matter of the action herein. The first defendant ('D1') was the Chairman of MCA Selangor. On 26 March 2012, the Chempaka Buddhist Lodge Selangor and Wilayah Persekutuan ('Lodge') made a proposal to MCA Selangor to purchase the land, which MCA Selangor rejected. Subsequently, the Lodge made a second proposal and recommended that MCA Selangor purchase an office unit in Shah Alam ('office lot'). On 16 November 2012, MCA Selangor informed the Lodge that it was, in principle, agreeable to swap the land for the office lot on conditions stated therein. Consequently, on 4 December 2012, the Lodge forwarded a cheque made in favour of MCA Selangor as earnest deposit for the proposed swap. However, the cheque was never deposited by MCA Selangor. Although the Lodge had forwarded a draft agreement to MCA Selangor and sent repeated reminders, on the same, there was no agreement executed between the Lodge and MCA Selangor in respect of the land. On 29 May 2015, MCA Selangor replied to the Lodge, denying the existence of a valid and binding sale and purchase agreement and stated that the agreement was conditional upon the MCA Central Committee's approval. The Lodge replied to MCA Selangor contending, *inter alia*, that a valid and binding contract had been concluded by virtue of the November 2012 letter, which MCA Selangor denied. Hence, the Lodge commenced the action against MCA Selangor, whereas the second defendant ('D2'), the Chief Executive Secretary of MCA Selangor, was sued for breach of warranty issued on behalf of MCA Selangor purportedly under authority of the Lodge. The issue for the court's determination was whether there was a concluded agreement between the Lodge and D1 to swap the land with the office lot pursuant to the terms of the 16 November 2012 letter.

Held (allowing plaintiff's claim against D1 with costs; dismissing plaintiff's claim against D2 with no order as to costs):

(1) A concluded agreement had evolved between the parties subject to some consequential terms to be agreed upon for formalisation of the deal and to execute the terms agreed upon. D1 was bound by the agreement in

respect of the subject property and was estopped from denying the existence of a concluded agreement based on their subsequent conduct and communication with D1. Further, the MCA Selangor was estopped from taking the position that there was no binding agreement between them and the Lodge. (paras 42 & 57)

(2) The person seeking specific performance must be prepared to perform his side of the agreement. The Lodge was not (and was never) the owner of the office lot and, although there was evidence that the Lodge intended to purchase the office lot ('office lot SPA'), the sale transaction was not completed. Hence, the Lodge had no title to transfer. The office lot SPA was signed in February 2013 and therefore, it would have been long lapsed and no documentary evidence was presented to show that the office lot SPA had been extended. In the circumstances, the Lodge was obviously not ready or in a position to perform the contractual obligation to justify the grant of specific performance. (paras 45 & 48-50)

(3) The Lodge sought to enforce the alleged agreement purportedly reached on or about 16 November 2013, but the action was only filed five years later. There was no plausible explanation proffered for the delay in commencing the action. Hence, the equitable relief of specific performance was deemed inappropriate for D1's breach of contract. (paras 51 & 54)

(4) Considering the long lapse of time from the time of concluding the office SPA following negotiations and the delay of about two years in the commencement of this action, the grant of specific performance was inappropriate and not fully justified. Instead, a reasonable award as damages for breach of contract *in lieu* of specific performance was appropriate and justified. The plaintiff was awarded the sum of RM250,000, which was paid as deposit under the SPA, as damages for breach of contract. This was a reasonable and fair compensation for the loss and damages suffered by the plaintiff arising from D1's breach that caused loss of use and enjoyment of the property to the plaintiff. (para 59)

Case(s) referred to:

Ayer Hitam Dredging Malaysia Bhd v. YC Chin Enterprise Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Bandar Eco-Setia Sdn Bhd v. Angelane Eng [2016] 3 CLJ 173 FC ***(refd)***

Caesar Lamar v. Thomas Dixon [1873] LR 6 HL 414 ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 CLJ 1 SC ***(refd)***

Leelavathi K Govindasamy v. Sivan Subramaniam & Anor [2015] 1 LNS 62 CA ***(refd)***

Waltons Store (Interstate) Ltd v. Maher & Another [1988] 76 ALR 513 ***(refd)***

Legislation referred to:
Specific Relief Act 1950, ss. 21(1), 23(b)

For the plaintiff - Gopal Sreenevasan & Leong Phaik Leng; M/s Sreenevasan Young
For the 1st defendant - Kevin Seet, Verene Tan Yeen Yi & Lim Lay Yee; M/s Cheang & Ariff
For the 2nd defendant - Wong Heng Khong; M/s HK Wong & Partners

Reported by S Barathi

JUDGMENT

Gunalan Muniandy J:

[1] This is a claim for breach of contract commenced on behalf of the Chempaka Buddhist Lodge Selangor and Wilayah Persekutuan ('the Lodge') against the MCA Selangor State Liaison Committee ('MCA Selangor') based on a purported sale and purchase agreement ('SPA') of a property owned by the latter. The second defendant ('D2') who was the Chief Executive Secretary of MCA Selangor at the material time was sued for breach of warranty based on a letter dated 16 November 2002 that he had issued on behalf of MCA Selangor purportedly under authority to the Lodge.

Factual Background Of Claim

[2] The undisputed material facts are well-summarised in the first defendant ('D1')'s submission as follows:

> The 1st defendant ('D1') is the Chairman of MCA Selangor. His tenure as Chairman started in January 2014.
>
> MCA Selangor is a branch of MCA, a registered society under the Societies Act 1966.
>
> Under the Constitution of MCA, any dealings of whatsoever nature in any immovable property held by and registered in the name of MCA or the relevant level of MCA are subject to a prior consent in writing of MCA Central Committee.
>
> MCA Selangor is the registered proprietor of the land held under HS(D) 145818 PT No 1694, Pekan Cempaka, Daerah Petaling, Negeri Selangor ('Land').
>
> On 26.3.2012, the Lodge made a proposal to MCA Selangor to purchase the Land for RM1,800,000.00. This was rejected by MCA Selangor.
>
> On 18.7.2012, the Lodge made a second proposal to MCA Selangor and recommended that MCA Selangor purchase an office unit known as Unit No. 1G (7th Floor), Worldwide Business Park, Block 2, Jalan Tinju 13/50, Seksyen 13, 40675 Shah Alam, Selangor ('Office Lot').
>
> On 8.10.2012, the Lodge in its letter to MCA Selangor enclosed the valuation reports of the Land and the Office Lot.

On 29.10.2012, the Lodge was informed by MCA Selangor in writing of the requirement of an approval from MCA Headquarters for any dealings of the Land.

On 16.11.2012, by way of a letter ('November 2012 Letter'), MCA Selangor informed the Lodge that it is in principle agreeable to swap the Land for the Office Lot on the following conditions:

(a) The purchase price of the Land shall be RM2,750,000.00 ('Purchase Price');

(b) The Purchase Price shall be paid in the following manner:

(i) by causing the transfer of the Office Lot to MCA Selangor;

(ii) by the Lodge paying the sum of RM200,000.00 to MCA Selangor ('Additional Sum'); and

(iii) by the Lodge paying an earnest deposit of RM50,000.00 by MCA Selangor;

(c) The disposal and transfer of the Land to the Lodge shall be on as is where is basis and subject to the procurement of the requisite state authority's consent;

(d) A reasonable timeframe of not less than 5 months from the procurement of the state authority's consent shall be given to the Lodge to effect the transfer of the Office Lot and payment of the Additional Sum to MCA Selangor; and

(e) Other usual and reasonable terms and conditions to be advised by the appointed legal advisors shall be incorporated in the agreement to be executed between the parties in due course.

On 4.12.2012, the Lodge's solicitors forwarded a cheque for RM50,000.00 made in favour of MCA Selangor as earnest deposit for the proposed swap. It is not in dispute that the cheque was never deposited by MCA Selangor.

On 22.1.2013, a draft agreement in respect of the Land was forwarded to the second defendant *via* email ('Draft Agreement') by the Lodge's solicitors.

On 23.1.2013, MCA Selangor was informed by the Lodge's solicitors that the Draft Agreement was forwarded to MCA Selangor for its 'perusal and comment' and the 'amended draft is subject to (the Lodge's) approval'.

MCA Selangor did not revert nor agree to the terms and clauses in the Draft Agreement. No agreement was executed between the Lodge and MCA Selangor in respect of the Land.

On 8.3.2013, a draft letter was faxed by the Lodge to MCA Selangor for MCA Selangor to sign the letter under its letterhead. MCA Selangor did not sign the letter.

On 11.7.2013, the Lodge's solicitors wrote to MCA Selangor asking, *inter alia*, for MCA Selangor's reply on the Draft Agreement.

On 18.7.2013, representatives of the Lodge met with representatives of MCA Selangor and MCA for obtaining the approval of MCA Central Committee for the swapping of the Land with the Office Lot.

On 28.4.2015, the Lodge's solicitors wrote to MCA Selangor expressing, *inter alia*, its disappointment that MCA Selangor has yet to reply on the Draft Agreement after a lapse of 2 years.

On 29.5.2015, MCA Selangor replied to the Lodge's solicitors' letter dated 28.4.2015. In its letter, MCA Selangor denied the existence of a valid and binding sale and purchase agreement and state that the alleged agreement is conditional upon the MCA Central Committee's approval.

On 18.4.2016, the Lodge through its solicitors' letter replied to MCA Selangor's letter dated 29.5.2015 and contend, *inter alia,* that (i) a valid and binding contract has been concluded by virtue of the November 2012 Letter; and (ii) 'The sale is not subject to your committee's approval as alleged'.

On 26.10.2016, by way of a letter, MCA Selangor replied to the Lodge's solicitors stating, *inter alia*, that (i) any sale and purchase of MCA's property is always conditional upon the approval of MCA Central Committee; (ii) the November 2012 Letter stated clearly the requirement for an agreement to be prepared for the parties approval; and (iii) the existence of a valid and binding agreement is denied.

On 24.11.2017, more than a year after MCA Selangor's letter dated 26.10.2016, the Lodge commenced this action against MCA Selangor.

Issues To Be Tried

[3] There are several issues raised for determination under agreed issues to be tried. However, both the plaintiff and D1 were on common ground that the central issue for determination at the trial was whether there was a concluded agreement between the Lodge and D1 to swap the subject land with the office pursuant to the terms of 16 November 2012 letter ('the 16 November letter').

The Plaintiff's Case

[4] Briefly, the Lodge's pleaded case as summarised by D1 is this:

The Lodge claims that the November 2012 Letter and its act in delivering the cheque for earnest deposit constituted a concluded agreement between the Lodge and MCA Selangor to swap the Land with the Office Lot ('Alleged Agreement').

On that basis, the Lodge claims that it is entitled to (i) specific performance of the Alleged Agreement; or (ii) damages for breach of the Alleged Agreement *in lieu* of or in addition to specific performance.

D1's Pleaded Case

[5] D1 pleaded, *inter alia*, that:

The Lodge is well aware that the proposed swapping of the Land with the Office Lot is subject to the approval of MCA Central Committee;

A The Lodge is also aware that MCA Central Committee did not approve the proposed swapping of the Land with the Office Lot;

There was no concluded agreement between the Lodge and MCA Selangor; and

The November 2012 Letter does not amount to a concluded agreement between the Lodge and MCA Selangor.

[6] The thrust of D1's defence revolved around article 146 of the MCA's Constitution which imposes restrictions on MCA Selangor when it wishes to deal with any of its immovable property. Article 146 states that:

C Subject to Article 150 and to the right of an organization at whatever level of the Party to enjoy and utilise all assets acquired by it, all assets of whatsoever nature shall belong to the Party of the relevant level of the Party as the case may be and shall be dealt with in such manner as the Party or the relevant level of the Party as the case may be, may decide and all immovable property shall be held and be registered in the name D of the Party or the relevant level of the Party as the case may be PROVIDED ALWAYS THAT there shall be no dealings whatsoever nature in any immovable property held by and registered in the name of the Party or the relevant level of the party as the case may be, unless the Central Committee has given its prior consent in writing to any such proposed dealings.

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Analysis Of Evidence And Finding

[7] In order to determine the central issue before the court, it is necessary, as suggested by the plaintiff to examine the communication between the parties in dispute through exchange of correspondence beginning from F 23 March 2012 culminating in the issuance of the 16 November letter.

[8] It began with the letter dated 23 March 2012 issued by the Lodge to MCA Selangor offering to purchase the property at RM1.8 million.

[9] This offer was followed up by another letter from the Lodge dated 18 July 2012. In this letter, the Lodge referred to their earlier offer and to G the 'several discussion (*sic*) about the approach to have an amiable arrangement for both MCA and our group.' PW1's evidence in respect of this letter is that it was issued after several meetings that he and one Lawrence from the Lodge had with the representatives of MCA Selangor where they found out from DW1 that MCA Selangor was looking for an office unit for H its own use and where DW1 asked them to assist in looking for such unit. It was PW1's evidence as well that DW1 suggested that this office unit be swapped with the property. PW1 and other officials then identified an office unit in the Worldwide Business Park in Shah Alam ('the office') which D1's own internal documents showed was among the chosen locations for I relocation.

[10] Following the discussion between PW1 and representatives of D1, by the letter of 18 July 2012, the Lodge offered to purchase the property be essentially suggesting the swapping of the property with the office (which is a unit within Worldwide) with the Lodge having to 'top-up any possible deficit' encountered by MCA Selangor.

[11] The Lodge then issued a third letter dated 3 August 2012 where they referred to their letter dated 18 July 2012, followed by these words:

> We are pleased to know that your State Liaison Committee has deliberated the above matter and have forwarded our proposals to your National Centre Committee for necessary procedural approval.

[12] There was then a fourth letter from the Lodge to D1 which referred to a meeting between the representatives of the Lodge and MCA Selangor on 5 September 2012. PW1 evidence of this PW1's evidence of this meeting was that the representatives of MCA Selangor, Dato' Tan Chai Ho (who was the MCA Treasurer General) and DW1 assured PW1 and others from the Lodge that there was no objection to the Lodge's proposal made on 18 July 2012 but that they were to provide the latest valuation reports for both the property and the office.

[13] In cross-examination, DW1 confirmed the meeting and that both he and Dato' Tan Chai Ho informed the Lodge that there was no objection to the Lodge's proposal made on 18 July 2012. In furtherance of the assurance of there being no objection to the Lodge's proposal and relying upon it, the Lodge then acted quickly to secure the office by making an earnest deposit of RM10,000 to Oriental Realty, the agent of the vendor of the office, on 12 September 2012, which was made known to D1 *via* the aforesaid fourth letter of 8 October 2012 copied to Oriental Realty. DW1 did not deny knowledge of the payment of the earnest deposit by the Lodge.

[14] D1 first responded to the Lodge's letters on 29 October 2012 wherein they referred to the letters dated 18 July 2012, 3 August 2012 and 8 October 2012. MCA Selangor did not contradict the contents of the Lodge's letters. Instead, in response they confirmed having no objections to the proposal and had forwarded the same to the Property Management Committee ('PMC') of D1 and added that the final decision would be subject to the committee.

[15] DW1 informed the court that the PMC of MCA Headquarters is the MCA Central Committee ('CC') and that the final decision rests with this committee given article 146 of the MCA's Constitution and that the purpose of this letter is to inform the Lodge that MCA Selangor required approval from the former. Thereafter, D1 forwarded the Lodge's offer to the MCA CC for their consideration on 9 August 2012.

[16] On 29 October 2012, MCA Selangor issued 16 November 2012 letter where they were 'in principle agreeable to swap the property' on the following 'basic terms and conditions'.

[17] As correctly pointed out in the plaintiff's submission, the contents and implication of 16 November 2012 are of great significance to the central issue in this case in that the letter:

> … was issued after MCA Selangor informed the Lodge that they had forwarded the Lodge's proposal to purchase the Property to the MCA Central Committee. It is critical to note from the 16.11.2012 Letter that nowhere was it mentioned that MCA Selangor were still awaiting that approval. Indeed, the terms of the letter suggested quite the opposite: that approval had been granted.

[18] Upon deliberation of D1's offer as above, the Lodge accepted the offer through its solicitors, M/S Lee & YC Tan who issued letter dated 4 December 2012, enclosing a cheque for the sum of RM50,000 as earnest deposit required under para. (b)(iii) of 16 November 2012 letter.

[19] Based on the above sequence of communication *via* exchange of correspondence, it was the Lodge's fundamental contention that a concluded agreement had evolved between the two parties for the sale and purchase of the subject property on the terms stipulated in 16 November 2012 letter.

[20] D1, on the other hand, took a contrary position of there being no concluded agreement briefly on these grounds:

(i) The parties have not signed any sale and purchase agreement ("SPA"); and

(ii) MCA Central Committee has not approved the sale of the property and the Lodge was aware of this since November 2012.

[21] In opposition to D1's contention that there was no concluded agreement on the basis that the agreement reached between parties was subject to a written sale and purchase agreement ('SPA'), reliance was placed on the leading Federal Court case of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 where it was held:

> It was submitted on the appellant's behalf that there was no contract concluded between the parties. Mr Abraham argued that the agreement to sell was subject to contract. He drew our attention to the phrase 'subject to the sale and purchase agreement' appearing in the estate agents' letter of 28 November 1989 which he said showed that the parties were still negotiating. There were, counsel submitted, many terms which the parties had not agreed upon. Some of these may never be agreed when the draft agreement was prepared and exchanged. Upon this premise, so it was said, there was no concluded contract.
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> …
>
> Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is

for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

Unless the approach we have stated is adopted, a party to a contract who – after having concluded his bargain – entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.

…

We find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. On the contrary, we find their objective intention to be travelling in quite the opposite direction.

They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will – acting out of necessity (see *Liverpool City Council v. Irwin* [1977] AC 239) – imply terms into the contract for sale in order to make it work. See *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land, a covenant on the part of the vendor to do all things necessary to give effect to the agreement.

Dr Geoffrey Cheshire in the 10th edition of his work, *The Modern Law of Real Property*, describes an open contract as follows:

> If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain obligations implied by the law.

The phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, it is, when read in the context of the correspondence and the objective aim of the transaction – and this is how we read them – indicative of an intention to merely formalise the agreement already concluded between the parties.

[22] Hence, the intention of the parties as reflected in the exchange of correspondence between them would be the paramount consideration rather than the absence of a formal written agreement after having reached *consensus ad idem* on the essential terms.

[23] In the instant case, the terms set out in 16 November 2012 include the essential terms, namely:

(i) The identities of the vendor and purchaser;

(ii) The description of the property;

(iii) The purchase price of the property; and

(iv) The manner in which the purchase price is to be paid.

[24] As contended by the plaintiff the terms spelt out in 16 November 2012 letter would suffice for the transfer of the subject land to be carried out making the requirement to enter into a formal SPA a mere formality.

[25] The next important issue for deliberation is whether the absence of approval from the MCA CC for the sale and purchase of the property would render the agreement as not having been concluded.

[26] On this issue too, the sequence of events beginning from the Lodge's first letter on this subject dated 3 August 2012 and the communication between the parties *via* correspondence, which have been adverted to, culminating in the offer *vide* D1's 16 November 2012 and the acceptance letter by the Lodge dated 4 December 2012 are of utmost importance. The plaintiff pointed out that:

> It is undisputed that the Lodge through its solicitors, M/S Lee & YC Tan, issued a letter dated 4.12.2012 accepting the terms of the 16.11.2012 Letter and critically, included a cheque for RM50,000.00 as earnest deposit and that while MCA Selangor did not cash the cheque, it did not return to the Lodge nor did it inform the Lodge that it was not cashing the cheque.

[27] Further, it was clear that from D1's conduct in response to the formal letters from M/S Lee & YC Tan between 4 December 2012 up to 29 May 2015 spoke for itself in giving the impression that as 16 December 2012 the MCA CC had given its approval to the said transaction.

[28] It was further compounded by the non-response by D1 to M/S Lee & YC Tan's letter dated 3 January 2013 notifying the former that pursuant to the agreement with D1, the Lodge had entered into an SPA with one Sumbang Makmur Sdn Bhd ('SM') for the purchase of the office. This letter elicited no response from D1 denying the swapping of properties agreement. Neither did they attempt to stop the execution of the SPA including when M/S Lee & YC Tan extended a draft SPA *via* email to D2 on 22 January 2013. There were several follow-up letters from the solicitors to D1 on the same matter but there was no response for about 20 months or more.

[29] D1 finally responded on 29 May 2015 for the first time wherein D1 again for the first time denied the existence of the property swap agreement involving the property and the office.

[30] It is undeniable that MCA Selangor's conduct throughout the period 4 December 2012 right up to 29 May 2015 silently encouraged the Lodge to operate on the premise that there was an agreement between them for the sale and purchase of the property on the terms and conditions set out in the 16 November 2012 letter for several reasons, amongst which is that the former did not return the cheque for RM50,000 made out in its favour as earnest deposit pursuant to the terms of 16 November 2012 letter. As far back as 3 January 2013, D1 was aware from the Lodge's letter dated 3 January 2013 through its solicitor that the latter took the view that there was a concluded agreement and they would act on it but D1 did not deny the same until 29 May 2015, which was plainly an unreasonable response. The view taken by the Lodge was, in the circumstance, wholly justified from the trail of correspondence. D1's case on the issue at hand hinged essentially on the fact of absence of the requisite prior written consent of the MCA CC before entering into the impugned agreement. This requirement is stipulated in article 146 of the MCA Constitution which states that:

> Subject to Article 150 and to the right of an organisation at whatever level of the Party to enjoy and utilise all assets acquired by it, all assets of whatsoever nature shall belong to the Party of the relevant level of the Party as the case may be and shall be dealt with in such manner as the Party or the relevant level of the Party as the case may be, may decide and all immovable property shall be held and be registered in the name of the Party or the relevant level of the party as the case may be PROVIDED ALWAYS THAT there shall be no dealings whatsoever nature in any immovable property held by and registered in the name of the Party or the relevant level of the party as the case may be, unless the Central Committee has given its prior consent in writing to such proposed dealings.

[31] It was contended that prior written consent from MCA CC for the swapping of the land with of the office lot is a must or prerequisite before any agreement can be concluded. In the absence of the written consent, there can be no concluded agreement between the Lodge and MCA Selangor that was enforceable.

[32] The knowledge of this requirement on the Lodge's part was purportedly reflected in its letter dated 3 August 2012 to MCA Selangor and further acknowledged in letter dated 29 October 2012. D1's main witness (DW1) testified that sometime after MCA CC meeting held on 27 November 2012, he had informed the Lodge and/or its representative(s) that MCA CC did not approve the swapping of the land which corroborated by DW4 who was the Chairman of MCA Selangor at the relevant time who testified that he had also informed one Liew Chang Huat, who was the then Chairman of the Lodge that MCA CC did not give its approval to the swapping of the land.

[33] It was also pointed out that the Lodge's document showed that the representatives of the Lodge met with SD1 and Dato' Tan Chai Ho (Treasurer General of MCA at the relevant time) on 18 July 2013 for the purpose of obtaining the approval of MCA CC for the said swap.

[34] Also that, as admitted by PW1 himself, as at 18 July 2013 the Lodge was aware that no written consent was given by the MCA CC for the impugned deal and that the Lodge understood that the said written consent or approval was a condition precedent of the deal.

[35] Lastly, it was contended on this point that the commencement of this action by the Lodge despite knowing full well that the MCA CC had yet to give approval as adverted to, was an attempt to seek the assistance of this court to bypass this unqualified prerequisite.

[36] On the purported unequivocal expression of the requirement of a formal contract ie, that there was no intention to create legal relations in the absence of a formal contract, D1 cited in the case of *Ayer Hitam Dredging Malaysia Bhd v. YC Chin Enterprise Sdn Bhd* [1994] 3 CLJ 133; [1994] 2 MLJ 754 where the Supreme Court held at p. 141(CLJ); p. 765 (MLJ):

> … it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v. Denny*) or 'subject to the preparation and approval of a formal contract' (see *Winn v. Bull*) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

[37] Reference was also made to the Supreme Court case of *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 CLJ 1 where it was held:

> First, the proviso stated as a proviso to condition No. 3, to which the sale of the said land would be subject, postulated very clearly the making of a sale and purchase agreement that would also include other 'usual terms and conditions'.
>
> …
>
> We were of the view therefore that the proviso would have the same effect as if the formula of 'subject to contract' had been in the said document. We now elaborate the formula.
>
> It is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract, 'formal' be it noted, is not to be understood in the common parlance as being just a 'mere formality' of no importance. As Sir Garfield Barwick who delivered the opinion in Daiman said:
>
> > But in general, employment of the formula subject to contract as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations.

[38] In the present action, it was argued that the requirement of a formal contract for the formation of a binding agreement is unequivocally expressed in para. 3(e) of the November 2012 letter. Paragraph 3(e) states:

> Other usual and reasonable terms and conditions to be advised by the appointed legal advisors shall be incorporated in the sale and purchase agreement to be executed between the parties in due course.

[39] As such, that upon applying the foregoing principles to our present case, it was clear that parties had no intention of a binding agreement until and unless a formal written agreement is executed and without an executed written agreement, no *consensus ad idem* was reached between the parties.

[40] In opposition to D1's contentions, the plaintiff sought reliance on the doctrine of equitable estoppel by reference to the Australian High Court decision in *Waltons Store (Interstate) Ltd v. Maher & Another* [1988] 76 [1 ALR 513, where the respondents/plaintiffs in the court below commenced the action against the appellant for a declaration that there was a binding agreement between the parties for a lease and for specific performance of the lease or damages *in lieu* thereof.

[41] Brennan J is dismissing the appellants' appeal held that the respondents had established an equitable estoppel against the appellant when he held that the respondents satisfied the six following elements:

> (1) the plaintiff assumed or expected that a particular legal relationship when existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

[42] In my considered view, based on the particular facts and circumstances of the instant case, the plaintiff's contention was correct that MCA Selangor is similarly estopped from taking the position that there was no binding agreement between them and the Lodge by reason of these factors:

(i) The Lodge very clearly assumed that there was a binding agreement between them since 3 January 2013;

(ii) MCA Selangor did nothing to disabuse the Lodge of this assumption;

(iii) The Lodge, acting on the assumption, entered into SPA for the office and expended monies to secure the office;

(iv) MCA Selangor knew that the Lodge entered into the SPA for the office to fulfil its obligations pursuant to the assumption that there was a binding agreement between it and MCA Selangor;

(v) MCA Selangor in refusing to complete the SPA of the property caused the Lodge to lose not only the deposit paid for the office but to stand liable for the completion of the office premises; and

(vi) MCA Selangor by their letter of 29 May 2015 falsely alleged that there was no binding agreement between them.

[43] As regards the appropriate remedy for breach of contract by D1, I am in agreement with D1's contention that based on all the relevant circumstances of this case, it would be inappropriate to make an order of specific performance in this case, particularly due to the lapse of time since the conclusion of the agreement in question in 2012.

[44] D1 relied on the principle that specific performance is a discretionary remedy but the discretion cannot be exercised arbitrarily or capriciously. The exercise of the discretion is always governed by fixed rules and principles: *Caesar Lamar v. Thomas Dixon* [1873] LR 6 HL 414; s. 21(1) of the Specific Relief Act 1950 ('SRA').

[45] Among the vital factors to be considered by the court before exercising its discretion is that the person seeking specific performance must be prepared to perform his side of the agreement. Section 23(b) of the SRA provides:

> Specific performance of a contract cannot be enforced in favour of a person:
>
> …
>
> (b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed.

[46] D1 correctly pointed out that it is imperative for the Lodge to show to the satisfaction of the court that it is at all times able and willing to perform its part of the bargain. In the Federal Court case of *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123, George Seah FJ (as he then was) held at p. 133:

> Now, in a suit for specific performance, a party treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit

> (see the *dictum* of Lord Blanesburgh in *Mama v. Sassoon* [1927-28] 55 IA 360 @ 372-373). Although, so far as the Act (Indian Specific Relief Act 1877 which is *pari materia* with our Specific Relief Act 1950) is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England (s. 24(b) and our s. 23(b) is the nearest) it seems invariably to have been recognised, and on principle, their Lordships think rightly, that the Indian and the English requirements in this matter are the same (see *Karasandas v. Chotalal* 25 LR Bom 1037 @ 1050). This principle has been consistently adopted and applied by the Courts in this country.

[47] This principle was adopted by the Court of Appeal in *Leelavathi K Govindasamy v. Sivan Subramaniam & Anor* [2015] 1 LNS 62; [2015] MLJU 13.

[48] In the context of the present case, the alleged agreement comprises the Lodge's obligation to transfer the office lot to MCA Selangor but the Lodge is not (and was never) the owner of the office lot. Amongst others, although an SPA dated 21 February 2013 was produced at trial to show the Lodge's intention to purchase the office lot ('office lot SPA'), the sale transaction was however not completed. As a result, the Lodge had no title to transfer.

[49] Another important fact is that as the office lot SPA was signed in February 2013, it would have been long lapsed. No documentary evidence was presented that the completion date of the office lot SPA had been extended. There was also no evidence to show that the Lodge is presently able to complete the office lot sale transaction.

[50] It would thus appear that at all material times, the Lodge was obviously not ready or in a position to perform the above contractual obligation to justify specific performance being granted against D1.

[51] In regard to laches or undue delay in commencing this action, of significance is the undisputed fact that the Lodge is seeking to enforce the alleged agreement purportedly reached on or about 16 November 2013 and yet, the Lodge filed the action about five years later, on 14 November 2017.

[52] In the Lodge's reply to D1's defence in reference to Lodge's justification for the delay, reliance was placed on D1's letter dated 29 May 2015 where D1 denied that the November 2012 letter constituted a valid and binding agreement between the parties. However, this action was instituted only two years later.

[53] In the Federal Court case of *Bandar Eco-Setia Sdn Bhd v. Angelane Eng* [2016] 3 CLJ 173; [2016] 1 MLJ 764, Zainun Ali FCJ observed as follows on the relief of specific performance:

> The relief of specific performance is a discretionary remedy. In any suit for specific performance, the court will consider the conduct of the plaintiff and the circumstances of the defendant before making any decree. Standard grounds of defence in equity such as laches and acquiescence will provide a defence to a claim for specific performance.

[54] Hence, in all the circumstances of this case, as the Lodge had not proffered a plausible explanation for the delay in commencing this action, the equitable relief of specific performance should be deemed inappropriate for D1's breach of contract as adverted to.

Conclusion

[55] Upon considering the evidence adduced by the plaintiff ('P') and the defendants ('D1 & D2') as a whole, the pleadings and the contentions advanced on behalf of the three parties involved in this dispute, the court's finding on the plaintiff's claim is this.

[56] As agreed by all the parties to this suit, the core and central issue in this dispute is simply whether the letter dated 16 November 2012 ('the 16 November letter') was an offer by D1 to sell the subject land to D2 on the terms set out therein which D1 accepted on 4 December 2012 as a result of which there was a concluded sales and purchase contract ('SPA') between these two parties subject to a mere formal SPA.

[57] The court therefore upholds D1's contention that a concluded agreement had evolved between the parties subject only to some consequential terms to be agreed upon for formalisation of the deal and to execute the terms agreed upon. Hence, D1 is bound by the said agreement in respect of the subject property and is estopped from denying the existence of a concluded agreement based on their subsequent conduct and communication with D1 as amply demonstrated by P's unrebutted evidence on this point.

[58] As regards D2, the court finds that the overall evidence of the material witnesses and surrounding circumstances point to the fact that he had the approval and authority to issue the 16 November letter on behalf of D1. This was clear from the evidence given by the relevant officers of D1, particularly as to the instructions given to D2 pertaining to the letter. D2 was not acting unilaterally and without authority. Hence, the claim against D2 for refund of the deposit sum of RM250,000 is not supported by the evidence. As it is clearly a claim without justification, it has to be rejected.

[59] On the issue of the order of specific performance ('SP') sought against P, it is settled law that this is a discretionary relief and not to be granted as of right for breach of contract. Considering the long time lapse from the time of concluding the office SPA following negotiation and the delay of about two years in the commencement of this action, the grant of SP under the present facts and circumstances is inappropriate and not fully justified. A reasonable award as damages for breach of contract *in lieu* of SP would be appropriate and justified. As P had claimed that they had paid a sum of RM250,000 as deposit under the SPA. I would award this sum as damages to P against D1 for breach of contract though there is no strict proof of

payment of the deposit. This sum is in the judgment of this court very reasonable and fair compensation for the loss and damages suffered by P arising from D1's breach that caused loss of use and enjoyment of the property to P.

[60] Judgment is therefore, entered for P against D1 with interest and costs as per prayers 19.2, 19.5 and 19.6 of the statement of claim. No order on the other prayers. Claim against D2 is dismissed with no order as to costs as D2 is a necessary party in this proceedings, considering that D1 had denied that D2 had its approval and authority to issue the impugned letter as its agent and/or employee.